

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ERIC GACHUCHA ANDIKA,)	
Plaintiff,)	
)	
v.)	Civil No. 7:13-CV-057-O-BL
)	
CHRISTOPHER B. JONES,)	
Attorney at Law,)	
Defendant.)	

REPORT AND RECOMMENDATION

ON THIS DATE, came on to be considered the papers and pleadings filed in this action, and the Court finds and orders as follows:

Plaintiff alleges that he was forced to plead guilty to charges of attempted escape and possession of a criminal instrument because his attorney, Defendant Christopher Jones, was unprepared for trial and ruined his motions to dismiss through unnecessary delay. Petition p. 7. Plaintiff further complains that Jones uttered a racial slur when referring to him. *Id.* He seeks monetary damages. *Id.* at p. 4.

Andika has failed to state a civil rights claim against his attorney. 42 U.S.C. § 1983 affords redress only for conduct committed by persons acting under color of state law. *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir. 1984). Generally, attorneys do not act under color of state law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981); *McCoy v. Gordon*, 709 F.2d 1060, 1062 (5th Cir. 1983). However, if there is evidence of a conspiracy between an attorney and a state actor, then the attorney may be deemed to have acted under color of state law for purposes of § 1983. *Tower v.*

Glover, 467 U.S. 914 (1984); *Polk County v. Dodson*, 454 U.S. at 325. However, assertion of a conspiracy without facts to support such an allegation is insufficient to state a colorable claim under § 1983. *Young v. Biggers*, 938 F.2d 565, 569 (5th Cir. 1991).

In the case at bar, Plaintiff makes no claim that Defendant Jones was involved in a conspiracy with a state actor. Thus, the complaint fails to allege a basis for holding Jones liable under § 1983 in his capacity as an attorney or as a private individual.

To the extent that Plaintiff seeks civil redress for his alleged injuries under state substantive law, this Court is without jurisdiction to entertain the complaint. When a complaint presents no federal question, 28 U.S.C. § 1332 requires complete diversity of citizenship and \$75,000 in controversy to invoke the jurisdiction of a federal court. From the face of Plaintiff's complaint, it is apparent that he and Defendant Jones are both citizens of Texas. *Complaint* ¶ IV. Because there is no diversity of citizenship, Plaintiff's complaint, construed as a diversity action, should be dismissed for lack of jurisdiction.

Plaintiff brings the instant complaint under the Civil Rights Act. However, his claim of ineffective assistance of counsel is a ground for relief properly brought in a habeas corpus proceeding. There is a one-year statute of limitations applicable to a petition for writ of habeas corpus. 28 U.S.C. § 2244(d). It appears from the instant complaint that Andika may have been convicted in 2012. *See* Petition p. 6. Therefore, it is possible that a habeas petition would be time-barred upon dismissal of the instant action. For that reason, the Clerk of Court will be directed to open a new habeas action by separate order. Andika's habeas claims will be severed from the instant case and considered in the new habeas proceeding.

For the foregoing reasons, it is RECOMMENDED that Plaintiff's civil rights claims be dismissed with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief may be granted.

It is further RECOMMENDED that Plaintiff's complaint, liberally construed as a diversity action, be dismissed without prejudice pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for lack of jurisdiction.

SO ORDERED this 5th day of August, 2013.



E. SCOTT FROST
UNITED STATES MAGISTRATE JUDGE